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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 789

T. A. WATKINS, *Appellant*,

v.

CITY OF WILSON, ET AL., *Appellees*.

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

The Appellees, the City of Wilson, a municipal corporation of the State of North Carolina, John Wilson, Mayor and Chairman of the Board of Commissioners of the City of Wilson; Thomas Watson, Jr., T. F. Hackney, Winette Peters, H. P. Benton, Jr., Earl Bradbury and Edger Norris, Serving as the Board of Commissioners of the City of Wilson; Mrs. Cecil Newberry, Mrs. T. L. Noe, Mrs. Albert Thomas, W. F. Pea-

body, Mrs. John G. Ashe, Jr., Mrs. M. W. Sutton, Jr., all being Precinct Registrars appointed for the May 2, 1961, Elections of the City of Wilson; Mrs. George Thomas Daniels, Mrs. W. F. Thrasher, W. L. Morris, Gary T. Fulghum, John Harriss, Mrs. Annie Bishop, Janie Liverman, Mrs. Dovery Watson, M. D. James, Mrs. Russell Landen, Mrs. H. T. Barkley, Mrs. Robert Pearce, all being Precinct, Election Judges appointed for the May 2, 1961, Elections of the City of Wilson, move this Honorable Court to dismiss the Appeal from the judgment of the Supreme Court of North Carolina, filed by that Court on October 11, 1961, and reported at 225 N. C. 510, 121 S. E. 2d 861, on the grounds that:

(I) The judgment rests on an adequate non-Federal basis; and

(II) The Appeal does not present a substantial Federal question.

STATEMENT

Appellees who move this Honorable Court for a dismissal of the instant Appeal are the City of Wilson, a municipal corporation of the State of North Carolina, and those of its municipal officers, voting registrars, and election judges who applied the relevant provisions of its City Charter to an election for municipal officers held on May 2, 1961. Appellant is one of thirteen (13) persons who, on that date, ran at large for election to the six-man Board of Commissioners of the City. He seeks to prosecute the Appeal on the assertion that one of the election provisions of the City Charter which was applied to the election violated his rights under the privileges and immunities clause, the due process clause and the equal protection clause of the 14th

Amendment to the Constitution of the United States. The provision of the Charter which he questions provides:

> "No ballot for Commissioners shall be valid unless as many candidates shall be voted for as there are vacancies to be filled." *Section 3, Session Laws 1957*, General Assembly of North Carolina, Chapter 13, Pp. 37, 38

Prior to the election, Appellant had filed a Complaint in the Superior Court of Wilson County, North Carolina, asking for judicial conclusion that the section violated State and Federal Constitutions, for temporary and permanent injunction prohibiting its application for a conclusion that any election in this biennium to which the section was applied was null and void, and for an Order granting him leave to participate in the election free from the burdens of the provision.

Appellant's objection to this section was that it outlawed certain techniques which he calls the "single shot ballot" and the "short ballot" through the use of which he desired to secure " * * * as favored a ranking as possible in the tally of votes for city commissioner in the May 2, 1961, city elections for the City of Wilson * * * ". (Complaint, Par. 5, Statement of Jurisdiction, P. 20a) These maneuvers which Appellant expected his supporters to execute consisted of the casting of votes for Appellant alone, or for Appellant and a number of candidates, which number would be, however, less than the full six vacancies. On April 29, 1961, the Appellant's Motion for Preliminary Injunction was denied and the May 2, 1961, election was held. Six persons were declared elected to the Board of Commissioners. They received 2,036; 1,897; 1,885; 1,835;

1,831; and 1,332 votes, respectively, on completed ballots. The Appellant received 211 votes on the completed ballots. There were a total of 761 ballots not counted for any Commissioner because of the failure of the person casting the ballot to vote to fill all six vacancies. After the election, the case was heard by the Superior Court upon stipulated facts and upon the record. The details of the voting recited above were a part of this stipulation. The Superior Court gave its opinion that the election law was valid and constitutional, and ordered that the action be dismissed. Upon Appeal, the Supreme Court of North Carolina affirmed the dismissal. That Court did not, however, reach the constitutional issue, holding that since Appellant could not have been elected even if all discarded votes had been counted in his favor, he was not in a position to call for a determination of the constitutionality of the statute. The Appellees' Motion herein has been filed, under Rule 16 (b), Revised Rules of the Supreme Court of the United States, to dismiss an appeal taken from the North Carolina Supreme Court decision.

ARGUMENT

I. The Judgment of the Supreme Court of North Carolina Has An Adequate Non-Federal Basis

The Supreme Court of North Carolina did not reach any constitutional issue in this case because the record before it effectively demonstrated that the cause was moot. *Watkins* v. *City of Wilson*, 225 N. C. 510, 121 S. E. 2d 861. Before the case had concluded in the trial court, the election which Appellant had hoped to win with the aid of injunction and declaratory judgment had already taken place. The six winning candidates had already been declared elected. Of the six, the one

receiving the least number of votes had received 1,332 votes on completed ballots against the 211 votes on completed ballots received by the Appellant. Furthermore, since there were only 761 invalidated ballots, it was obvious that Appellant would have been defeated even if every one of them had been counted and counted solely in his favor. It is further to be noted that even if the 211 ballots upon which the name of the Appellant appeared had been revised into single shot ballots in his sole favor and arbitrarily subtracted from the total votes of the candidate elected with the 1,332 votes, the Appellant would still have been defeated. Therefore, at the time the Supreme Court of North Carolina decided the case, there was " * * * no actual controversy involving real and substantial rights between the parties to the record and no subject matter upon which the judgment of the Court [could] operate." *Mills* v. *Green*, 159 U. S. 651, 653, 40 L ed 293, 16 S. Ct. 132. See also *Richardson* v. *McChesney*, 218 U. S. 487, 492, 54 L ed 1121, 1122, 31 S. Ct. 43; and *Jones* v. *Montague*, 194 U. S. 147, 48 L ed 913, 24 S. Ct. 211.

The refusal of the State Supreme Court to determine a constitutional issue under such circumstances and its holding of no justiciability, presented an adequate non-Federal basis and infringed no constitutional right of the Appellant. *Love* v. *Griffith*, 266 U. S. 32, 69 L ed 157, 45 S. Ct. 12. The decision was, furthermore, in accord with standards established by this Honorable Court for correct judicial approach to constitutional questions. *Ashwander* v. *T.V.A.*, 297 U. S. 288, 80 L ed 707, 56 S. Ct. 466. (Concurring opinion Brandeis, J.) *Poe* v. *Ullman*, 367 U. S. 497, 6 L ed 2d 989, 81 S. Ct. 1752.

II. The Appeal Does Not Present a Substantial Federal Question

Appellant's claim that the asserted abridgment of his rights as a candidate and a voter present a substantial question under the privileges and immunities clause of the 14th Amendment of the United States Constitution cannot be supported.

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. * * * The right to become a candidate for state office, like the right to vote for the election of the state officers, * * * is a right or privilege of state citizenship, and not of national citizenship which alone is protected by the privileges and immunities clause." *Snowden* v. *Hughes*, 321 U. S. 1, 6, 7, 88 L ed 497, 502, 64 S. Ct. 397

Precisely the same thing may be said of his claim under the due process clause.

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to a state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall* v. *Beckham*, 178 U. S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave* v. *Newell*, 246 U. S. 650, as we reaffirm it now." *Snowden* v. *Hughes*, Supra 7

Similarly, this Honorable Court will " * * * have no difficulty with the equal protection clause because no

showing has been made that anyone comparably situated has been treated differently from Petitioner." *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37, 41, 99 L ed 46, 75 S. Ct. 92, accord *Hile* v. *City of Cleveland*, 266 U. S. 582, 69 L ed 452, 45 S. Ct. 97.

Finally, it is submitted that the Appellant's position is not supported by equity. He does not seek equality of opportunity in the election, but rather desires a favored position in the race for office through the use of his electioneering devices. Appellant ignores the practical difficulty that his use of such methods might well call for counter-bloc methods on the part of other candidates. Such methods, carried to any length, could well defeat the orderly procedure and purpose of any at-large election to fill multiple vacancies. The existing Charter, to the contrary, has a sound basis in public policy. Its purpose may be well expressed by words which the Supreme Court of Minnesota has used concerning a similar provision.

> "The charter does not command the elector not to vote. It enjoins him to vote. No clause in the constitution guarantees him the right not to vote. It is his duty as a citizen to exercise his franchise to the full. No citizen has any constitutional right to perform half his public duty by voting for only half the number of candidates to be elected to any office, and the law that requires him to perform his full public duty and vote for all he may as a condition to vote for any is not an unwarranted restriction of his right to vote 'for all officers' to be elected." *Farrell* v. *Hicken*, 125 Minn. 407, 147 N.W. 815, 818

Appellees believe that these goals speak for themselves.

CONCLUSION

The Motion to Dismiss on one or the other of the grounds submitted should be granted and the Appeal herein, dismissed.

Respectfully submitted,

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APPENDIX

1957 Session Laws—Chapter 13, Pages 37, 38.

AN ACT TO AMEND THE CHARTER OF THE CITY OF WILSON SO AS TO PROVIDE FOR THE ELECTION OF MUNICIPAL OFFICIALS, AND TO FIX THEIR TERMS OF OFFICE.

The General Assembly of North Carolina do enact:

Section 1. That Chapter 408, Private Laws of 1907, as amended by Chapter 536, Session Laws of 1943, and as further amended, constituting the Charter of the City of Wilson, be and the same is hereby further amended by rewriting Section 1 of Chapter 536, Session Laws of 1943, the same being Section 4 of the Charter of Wilson, to read as follows:

"Section 1. For the purpose of electing a Mayor, a Board of six Commissioners, and a Judge of the Municipal Recorder's Court, all of the City of Wilson, there shall be held in said City, on Tuesday after the first Monday in May, 1957, and biennially thereafter, a nonpartisan election. The officials so elected shall hold their offices until their successors are elected and qualified. The Commissioners shall be elected at large by the qualified voters of the City."

Sec. 2. That Section 10 of Chapter 536, Session Laws of 1943, be and the same is hereby rewritten to read as follows:

"Sec. 10. The election for mayor and judge of the municipal recorder's court shall each be determined by a majority vote. In the event more than two persons are candidates for either of said offices and neither candidate receives a majority of the votes cast for such office, the person receiving the highest number of votes cast for such office shall be declared elected unless the candidate receiving the second

highest number of votes cast shall, within forty-eight hours after the result of the election shall have been canvassed and declared, demand by writing filed with the town clerk for a second election, which demand must be accompanied by a payment to the Town of Wilson of the sum of twenty-five dollars ($25.00) to the use of said Town, and the Commissioners shall thereupon call and provide for the conduction of a second election to be held on the fourth Tuesday after the first Monday in May following the first election, for the purpose of choosing a mayor or judge of the municipal recorder's court as between the two highest candidates for such office. Only the candidates receiving the largest and second largest vote for such offices in the first election shall be voted on in the second election. The six candidates receiving the highest number of votes for membership on the Board of Commissioners shall be declared elected, and there shall be no second election for any of such offices."

Sec. 3. No ballot for Commissioners shall be valid unless as many candidates shall be voted for as there are vacancies to be filled.

Sec. 4. Each Commissioner shall receive for his services the sum of twenty-five dollars ($25.00) per month to be paid from the General Fund of the City; and in addition thereto he shall receive five dollars ($5.00) for each special meeting of the Board attended by him, to be paid also from said General Fund.

Sec. 5. All laws and clauses of laws in conflict with the provisions of this Act are hereby repealed.

Sec. 6. This Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 1st day of March, 1957.